No. 82-2140

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR HOBBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether alleged discrimination in the selection of grand jury forepersons resulting in the underrepresentation of women and blacks in that position provides a basis for reversal of a conviction of a white male defendant upon an indictment returned by the grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 702 F.2d 466. The district court issued no written opinion. The transcript of the district court's ruling from the bench is reproduced at J.A. 110-113.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1983. A petition for rehearing was denied on April 29, 1983 (see J.A. 123-124). The petition for a writ of certiorari was filed on June 29, 1983, and was granted on December 12, 1983, limited to the third question presented therein (see J.A. 125). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner and co-defendant Mort Levi were convicted of con-

spiring to defraud the United States of monies appropriated under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (& Supp. V) 801 *et seq.*, in violation of 18 U.S.C. 371 and 665 (Count 1). In addition, petitioner was convicted on three counts of fraudulently obtaining and misapplying CETA grant funds, in violation of 18 U.S.C. 665 (Counts 3, 4, and 5). Petitioner was sentenced to 18 months' imprisonment on Count 1; his sentence to concurrent terms of two years' imprisonment on Counts 3, 4 and 5 was suspended in favor of five years' probation. In addition, he was fined $10,000 on each count. The court of appeals affirmed (Pet. App. A1-A19).

1. The evidence adduced at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A8). The pertinent background is as follows: At the time of the events that led to this prosecution, in 1979, petitioner was the president of the North Carolina chapter of the AFL-CIO. Petitioner also owned Precision Graphics, Inc., a printing company located across the street from the labor organization's headquarters in Raleigh that sometimes performed work for the chapter. Prior to 1979, the labor organization had been using independent contractors to maintain its membership data in computerized form, but as early as 1977 petitioner had suggested to the chapter's board that the organization should acquire its own computer capacity. Petitioner had also mentioned that there might be CETA funds available for projects the AFL-CIO was interested in (II C.A. App. 1199, 1201). Petitioner was well acquainted with the CETA program; he had entered into 15 CETA contracts between 1977 and 1979.

In early 1979 petitioner's interest in the CETA program and his interest in acquiring a computer for AFL-CIO use began to converge. In January petitioner began discussions with a representative of Mohawk Data Sciences, a firm that had provided equipment for other state AFL-CIO affiliates that was tailored to exchange data with the computers in AFL-CIO national headquar-

ters, concerning acquisition of such a computer for the North Carolina AFL-CIO chapter (I C.A. App. 427-431). Meanwhile, petitioner and co-defendant Levi formed a new company, Precision Data, Inc., which promptly submitted to the North Carolina Department of Natural Resources and Community Development (DNRCD) an application for CETA funds to establish a data processing training program.

Precision Data's proposal was received with some skepticism by DNRCD staff members because officials doubted the need for such a program in the region to be served, and because Precision Data had no staff or plant, nor any experience in data processing training or in the CETA program generally, and would be wholly funded by the proposed grant (II C.A. App. 655-657). Petitioner's funding proposal was modified in response to some of these concerns. Because it was a going enterprise with experience in administering CETA training, Precision Graphics was denominated the grantee in place of Precision Data. On May 21, 1979, DNRCD approved a grant of $129,429 to Precision Graphics to operate the proposed data processing training program.

Earlier, in April, petitioner, acting on behalf of Precision Data, had agreed to purchase a computer from Mohawk Data Sciences, for $41,317.68. A deposit of $10,329.42 was required, with the balance to be paid in 18 monthly installments of $1721.57 (Gov't Exhs. 8, 40; 3 Tr. 53-56). In addition, Mohawk agreed to provide Precision Data with maintenance service for $214/month.

On May 21, 1979, the very day that Precision Graphics' CETA application was approved, Precision Data and Precision Graphics entered an agreement for the latter to lease the computer just purchased by the former. A monthly rental of $3,000 and a maintenance fee of $125/*week* was agreed upon. As soon as the CETA contract between DNRCD and Precision Graphics was formalized, petitioner's co-defendant Levi secured an advance of $43,696, and transferred $18,000 of that amount to Precision Data, $9,000 of which was designated for computer

rental charges. Although the computer was not installed until June 15, 1979, on July 3 petitioner issued another check on Precision Graphics' data processing training program account, in the amount of $5,000, to Precision Data for computer rental. In addition, although Precision Data's obligation to pay Mohawk Data for maintenance services (at a rate of $214/month) did not accrue until July 16, 1979, Precision Graphics expended CETA grant funds under its maintenance agreement with Precision Data at the rate of $125/week beginning May 21, 1979. The overcharges thus reaped by petitioner through Precision Data were the basis for the indictment.[1]

2. a. Prior to trial, petitioner, a white male, moved to dismiss the indictment "due to improper selection of grand jurors" (J.A. 32).[2] Invoking the Fifth and Sixth Amendments and provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. (& Supp. V) 1861 *et seq.*, petitioner's motion papers alleged that the administration of the Jury Plan for the Eastern District of North Carolina "failed to ensure grand juries selected at random from a fair cross-section of the community within the District," or that all eligible citizens have a proper opportunity to serve as jurors; that jurors had been excluded from service on the basis of race, economic status, occupation or age; that various geographical subdivisions within the district were not proportionally represented; and that the list of names for the master jury wheel had

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[1] Petitioner's scheme began to unravel in August 1979, when DNRCD's Independent Monitoring Unit began to audit Precision Graphics' performance under its CETA contract. Based upon the results of the audit, the matter was referred for possible prosecution. The discrepancy between the rate of the monthly maintenance charge exacted by Precision Data, and its own maintenance costs was the basis for Count 3 of the indictment. The discrepancy between the monthly computer rental charged and the cost to Precision Data of the equipment was the basis for Count 4. The rental charged for the period prior to installation of the computer was the basis for Count 5.

[2] Petitioner's co-defendant Levi, a black male, apparently joined in petitioner's motion (see I C.A. App. 211).

impermissibly been constituted from the list of persons who had actually voted (J.A. 33-34). No reference was made in this motion to the selection of grand jury forepersons.

The district court held an evidentiary hearing on petioner's motion to dismiss the indictment. The only witness to testify was James O'Reilly, a statistical social science consultant. O'Reilly testified concerning a comparison he had made between 1970 census data on the racial, employment, educational and age characteristics of the population of the judicial district and the characteristics of a sample drawn from master jury wheel in use in 1977 in the Eastern District of North Carolina (J.A. 64-66). He concluded that various population groups were underrepresented on the master jury wheel as compared with the census figures and that such underrepresentation was attributable to the district jury plan's use of the list of actual voters in the previous presidential election as the source for the names of potential jurors (J.A. 80-84).[3]

Although no issue as to foreperson selection had been framed by the pleadings, O'Reilly also testified as to the characteristics of the persons selected as grand jury foreperson or deputy foreperson in the district between 1974 and 1981. He reported that none of the 15 grand juries that sat in this period had a black or female foreperson. Of the 15 deputy forepersons, three were black and six were female (J.A. 85-87). Based upon the census statistics, O'Reilly concluded (J.A. 86-88) that black persons and women were underrepresented among grand jury forepersons and deputy forepersons (see page 5 note 3, *supra*). He did not, however, have any information as to the race or gender composition of the grand jury that actually indicted petitioner (J.A. 104), nor did he

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[3] O'Reilly testified that, according to the census, 30% of the district population was black in 1970, whereas in his sample 20% of the jurors were black in 1977 (J.A. 70-71). Apparently he regarded the census population as evenly divided between males and females (see J.A. 88).

have analogous information with respect to any other actual grand jury that sat in the Eastern District of North Carolina during the period for which the identity of forepersons was examined (J.A. 105).

Petitioner argued (I C.A. App. 205-207) that he had established the elements of a prima facie case as outlined in *Rose* v. *Mitchell*, 443 U.S. 545 (1979), thereby requiring the government to rebut an inference that the cause of low representation of blacks and women as officers of the grand jury was intentional discrimination by the judges of the United States District Court for the Eastern District of North Carolina in their selection of forepersons and deputy forepersons.[4] Petitioner also argued that the statistical evidence showed substantial underrepresentation of various population groups on the master jury list itself, and that the jury list accordingly did not reflect a "fair cross section of the community" (I C.A. App. 207-208).

In response, the government argued that the juror selection method employed in the Eastern District of North Carolina is consistent with the provisions of the Jury Selection and Service Act of 1968, and that there had been no showing that the selection procedures employed systematically excluded any class of persons eligible for service (I C.A. App. 208-209). The government also observed that there had been no showing that any group was underrepresented on the grand juries actually selected during the period 1974-1981, and that there had been no evidence as to the make-up of the grand jury that had indicted petitioner (*ibid.*). The government concluded that petitioner had not made a showing of purposeful discrimination in the selection of forepersons

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[4] In the district court, petitioner did not explicitly identify the constitutional basis for his claim of foreperson discrimination. But his citation of *Rose* v. *Mitchell*, and his effort to bring this case within the scheme allocating the intermediate evidentiary burdens applied there, indicates that the nature of the claim was intentional discrimination in violation of equal protection principles, applicable under the Due Process Clause of the Fifth Amendment.

or of the entire grand jury panel (*id.* at 210). The government did not put on any rebuttal evidence of its own.

Focusing on the challenge to procedures for selection of the grand jury as a whole, the district court denied petitioner's motion to dismiss (J.A. 110-113). The Court relied primarily upon *United States* v. *Coats*, 611 F.2d 37 (4th Cir. 1979), which upheld the jury selection plan of the Eastern District of North Carolina against a challenge based upon much the same evidence as was adduced here (see J.A. 59-60, 64-66, 101). The court did not believe that petitioner's added claim of discrimination in the selection of forepersons called for a different result (*id.* at 113).

b. The court of appeals affirmed the convictions of petitioner and his co-defendant. Petitioner had identified 14 issues on appeal and his brief encompassed numerous additional issues under these headings. The court of appeals determined, however, that "[m]ost of the contentions"—including petitioner's claim that he had been the victim of impermissible selective prosecution—"are of little substance or frivolous," and accordingly limited its discussion to two points (Pet. App. A8).[5] First, the court discussed and rejected petitioner's contention that he had been prejudiced by the district court's correction of an error it had made in preliminary instructions concerning the elements to be proven by the government in order to establish a violation of 18 U.S.C. 665 (Pet. App. A8-A13).

Second, the court of appeals upheld the denial of petitioner's motion to dismiss the indictment based upon alleged discrimination against blacks and women in selection of federal grand jury forepersons in the Eastern District of North Carolina (Pet. App. A13-A19).[6] The

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[5] This Court limited the grant of certiorari to the third question presented by the petition, declining to consider, inter alia, petitioner's selective prosecution claim (compare Pet. Br. 96-97).

[6] On appeal petitioner and his co-defendant abandoned their challenge to the jury selection procedure used in the District and

court of appeals recognized (*id.* at A14-A15) that, in *Rose* v. *Mitchell*, 443 U.S. 545, 551 n.4 (1979), this Court had reserved the issue whether discrimination affecting only the selection of grand jury forepersons requires reversal of a conviction upon the resulting indictment. The court of appeals observed that, in contrast to the Tennessee scheme at issue in *Rose*, federal grand jury forepersons are chosen from among the members of the grand jury itself, and their duties are purely ministerial and provide them with no special influence over the rest of the grand jury (Pet. App. A16-A17). The court explained (*id.* at A17-A18):

> The impact of the federal grand jury foreman, as distinguished from that of any other grand juror, upon the criminal justice system and the rights of persons charged with crime is minimal and incidental at best. Any suspicion that his office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions.

Accordingly, although cognizant of the contrary decision of the Eleventh Circuit in *United States* v. *Perez-Hernandez*, 672 F.2d 1380 (1982), the court concluded that the "role [of a federal grand jury foreperson] is so little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection" (Pet. App. A18).

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the constitution of the grand jury taken as a whole (Pet. App. A14). The district court's ruling respecting discrimination in foreperson selection was challenged in the brief of petitioner's black co-defendant, Levi, on an equal protection theory (Levi C.A. Br. 8-15). In that brief it was also argued (at 15) that petitioner had standing to press the equal protection claim as well. That assertion was supported only by citation of cases presenting Sixth Amendment fair cross section claims (*Duren* v. *Missouri*, 439 U.S. 357 (1979) and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975)) or due process claims (*Peters* v. *Kiff*, 407 U.S. 493 (1972)) (Levi C.A. Br. 15). Petitioner simply adopted his co-defendant's argument on this point (Pet. C.A. Br. 45).

SUMMARY OF ARGUMENT

The issue in this case is not whether discrimination against blacks or women in the selection of grand jury forepersons is lawful, for there is no dispute between the parties that it is not. Rather, the question is whether the remedy of dismissal of a valid indictment returned by a grand jury properly drawn from a fair cross section of the community must be extended to a white male defendant who cannot show that he has suffered any specific injury from the alleged discrimination.

A. 1. The Court has long held that a black defendant cannot be validly indicted by a grand jury or convicted by a petit jury from which blacks have been purposefully excluded, because such official discrimination brands black persons as inferior in the eyes of the law and therefore may prevent even-handed administration of justice to black defendants. But petitioner, a white male, cannot claim any injury of this kind flowing from the discrimination he alleges to exist against blacks and women. He accordingly has no standing to challenge his indictment on equal protection grounds.

2. In *Peters* v. *Kiff*, 407 U.S. 493 (1972), the Court accorded standing to a white defendant to seek dismissal of an indictment based upon discriminatory exclusion of blacks from the grand jury that indicted him, reasoning that due process assures a defendant a jury drawn from the full range of groups represented in the community population (opinion of Marshall, J.) and that exclusion of a racial group from jury service is a violation of 18 U.S.C. 243 (opinion of White, J.). But no violation of 18 U.S.C. 243 could be alleged here, and it is difficult to see how designation as foreperson of one grand juror from among a grand jury drawn in a representative fashion could disable it from exercising its independent judgment or destroy its broad-based character. Moreover, the single foreperson of a grand jury is not required to—and obviously could not—serve as a representative of all tendencies within the community. An allegation of discrimination in foreperson selection accordingly does

not implicate the rights of a defendant to a grand jury properly drawn from the community.

Nor—assuming petitioner has standing to press such a contention—must the remedy of dismissal be made available here to guard against any debilitating effect of official tolerance of discrimination upon the grand jury's ability to administer justice impartially. Discrimination limited to the selection of a single foreperson from among the members of a properly constituted grand jury casts no shadow of prejudice within the jury room because, absent other indicia of discrimination, its operation would not be apparent to the grand jurors.

3. Petitioner quarrels with the court of appeals' characterization of the role of foreperson as a "ministerial" one. Even if one accepts petitioner's description of the foreperson's job, however, the role is essentially administrative and clerical. The key fact is that a foreperson lacks any authority to determine whether a prosecution will go forward or not that is independent of that of the grand jury upon which he sits and casts a single vote. In any event, petitioner's argument is misconceived, for the issue in this setting is not, as petitioner appears to assume, whether the job of foreperson is an important one in some abstract sense, or significant enough to make discrimination in foreperson selection cognizable by the courts when a member of an allegedly excluded class seeks to redress such discrimination. Distinctive interests of criminal defendants have been held to permit them to challenge discrimination in selection of the grand jury as a whole. Measured in terms of those interests, however, the role of the foreperson lacks any attribute that would justify dismissal of an indictment based on the selection of one individual or another to serve in that capacity.

B. 1. The rule petitioner advocates would place substantial and unjustifiable burdens upon the administration of justice. It is petitioner's submission that by demonstrating historical underrepresentation of blacks or women among grand jury forepersons in the judicial dis-

trict in which he was indicted he has cast upon the "government" the burden of demonstrating that this pattern is not due to purposeful discrimination by the judges of the district court. But because the selection of a foreperson is entrusted by law to the discretion of the district judge who supervised and impanelled the grand jury, no practical means of rebutting a statistically-based inference of discrimination exists except to adduce the testimony of the district judges or judge responsible for selection. This procedure has been employed within the Eleventh Circuit pursuant to the decisions of that court. It has placed a substantial burden upon the administration of justice, wholly unjustified by any injury suffered by defendants.

2. The remedy of dismissal of an indictment need not be extended to a criminal defendant in order vicariously to protect the rights of would-be forepersons or to protect the integrity of the judicial system. Other, more appropriate means are available to fulfill those purposes. The Judicial Councils established pursuant to 28 U.S.C. (& Supp. V) 332 have jurisdiction to investigate impediments to the administration of justice within their respective circuits, including those attributable to the conduct of judicial officers, and have the power to issue corrective orders binding upon the responsible judicial personnel. This procedure is available both to assure the integrity of the administration of justice and to assure that no class of persons need suffer discriminatory action by any district judge.

The Judicial Conference and its standing committees have similar investigatory capacity and have the authority to recommend any amendment to the Federal Rules of Criminal Procedure that is necessary to carry out the salutary policy of preventing discrimination in the administration of justice. Thus, if investigation should disclose a problem, the courts' supervisory responsibilities over the administration of justice may be most effectively carried out directly by requiring nondiscriminatory foreperson selection rather than indirectly by providing the

windfall of a dismissal to an uninjured defendant. Maintenance of a civil action by members of a discriminatorily excluded class likewise could afford relief without attendant cost to society. There accordingly is no warrant for permitting a wholly uninjured defendant such as petitioner to seek dismissal of the valid indictment returned against him.

ARGUMENT

A WHITE MALE DEFENDANT'S CLAIM OF DISCRIMINATION AGAINST BLACKS AND WOMEN THAT IS LIMITED TO THE SELECTION OF A FOREPERSON FROM AMONG THE MEMBERS OF A PROPERLY CONSTITUTED GRAND JURY PROVIDES NO BASIS FOR A MOTION TO DISMISS THE INDICTMENT

Based upon purely statistical evidence that black persons and women have historically been underrepresented among grand jury forepersons in the Eastern District of North Carolina, petitioner claims that foreperson selection in that district reflects a pattern of intentional discrimination. But the direct object of petitioner's claim is not to redress the alleged discrimination or to open the role of foreperson to black or female grand jurors that have allegedly suffered discriminatory consideration. Rather, based upon the proffered evidence petitioner seeks reversal of his conviction and dismissal of his indictment. Contrary to petitioner's characterization of the decision of the court of appeals (see Pet. Br. 14), and the overstated claim of an amicus curiae (ACLU Br. 1), neither the United States nor the court of appeals has "defended * * * reservation of a position exclusively for white males" in this case. Rather, the question that we have addressed is a variant of the remedial one that was reserved in *Rose* v. *Mitchell*, 443 U.S. 545, 551-552 n.4 (1979): whether, if proven, "discrimination with regard to the selection of only the foreman requires that a sub-

sequent conviction be set aside, just as if the discrimination * * * had tainted the selection of the entire grand jury venire." See pages 22-23 note 12, *infra*.

Our answer to this question is that dismissal of an indictment is unwarranted when a defendant's complaint is that there has been discrimination only in the exercise of the court's discretion as to which of the members of a properly selected grand jury, drawn at random from a fair cross section of the community, shall carry out the duties of the foreperson. Because such discrimination has a de minimis impact upon the rights of a criminal defendant, while the remedy proposed (and the procedural scheme by which it would be administered) would impose heavy burdens upon the administration of justice, and because less costly and more effective means of assuring equal consideration of all grand jurors for the role of foreperson appear to be available, nothing in this Court's teaching would justify affording the remedy of dismissal to a criminal defendant.

Petitioners and the amici search far and wide for a basis in the constitutional or other federal law expounded by this Court that would support the petitioner's claim for relief. Throughout the course of this litigation the doctrinal basis for petitioner's claim has been obscure. As indicated in our statement of the case (page 6 note 4 & page 8 note 6, *supra*), petitioner generally relied below upon equal protection principles and cases. He appeared, however, to invoke broader considerations of due process and representational values in the jury selection process in asserting his entitlement, as a white male, to complain of alleged discrimination against black persons and women. In this Court, at the petition stage, petitioner framed a broad "due process" claim (Pet. 32, 39), albeit relying primarily on *Rose* v. *Mitchell*, which addressed an equal protection claim.[7]

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[7] Because the guaranty against invidiously discriminatory official action by agencies of the United States has been located in the Fifth Amendment Due Process Clause, see *Bolling* v. *Sharpe*, 347

In his brief on the merits, petitioner still does not settle upon any doctrinal basis or constitutional foundation for his claim. Rather, petitioner merely surveys three lines of cases addressing aspects of selection of the jury as a whole: cases founded upon the Fourteenth Amendment Equal Protection Clause (Pet. Br. 51-62), cases decided under the Sixth Amendment fair cross section requirement and the Fourteenth Amendment Due Process Clause (Pet. Br. 62-70), and a triad of cases said to have been decided under this Court's supervisory power over the administration of justice in the lower federal courts (Pet. Br. 70-76). Petitioner does not specifically place reliance on any of these lines of authority. And there is not—and could not be—any suggestion that any of the cases cited addresses the question whether an indictment should be dismissed because of discrimination affecting only the selection of a foreperson from among the members of a properly constituted grand jury. Petitioner simply asserts (Pet. Br. 77) that "it follows" from his survey of the three lines of authority that the indictment in his case must be quashed. As we indicate below neither any of the lines of authority canvassed by petitioner viewed in isolation nor all of them read together support that assertion.

The same is true of the diverse arguments proffered by the amici curiae. The amici generally do not purport to support the arguments made by petitioner below or in this Court, and do not even endorse the rationale adopted by the Eleventh Circuit in its decisions contrary to the decision below.[8] Rather, amicus ACLU advances a novel argument, which has allegedly "escaped the attention of the lower courts which have heretofore considered th[e] issue" (ACLU Br. 2) in this case. It is that discrimina-

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U.S. 497, 499 (1954), petitioner's formulation is inherently ambiguous.

[8] *I.e.*, *United States* v. *Cross*, 708 F.2d 631 (1983), petition for cert. pending, No. 83-1037, and *United States* v. *Perez-Hernandez*, 672 F.2d 1380 (1982).

tion in the selection of a foreperson from among its members deprives a grand jury of its status as a "grand jury" satisfying the requirement of the indictment clause of the Fifth Amendment. And amicus curiae NAACP Legal Defense and Education Fund (LDEF) urges the Court to decide this case under the Jury Selection and Service Act of 1968. Yet, ACLU is obliged to acknowledge (Br. 18-19) that no authority supports conversion of a fair cross section requirement applicable to the list from which grand jurors are drawn to a requirement of proportional representation in the post of foreperson. And the LDEF acknowledges (Br. 15) that the Jury Selection and Service Act is not, on its face, applicable to foreperson selection at all. Thus, as is detailed below, none of the alternative contentions advanced by the amici carries petitioner over the hurdle that his own arguments fail to surmount: the absence of any sufficient justification for dismissing the indictment of a criminal defendant held to answer by a properly constituted grand jury.

A. Equal Protection and Due Process Principles Do not Require Dismissal of an Indictment Based Upon Discrimination Extending Only to the Selection of a Foreperson From Among the Members of a Properly Constituted Grand Jury

1. a. This Court "has long recognized that 'it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded * * *.'" *Castaneda* v. *Partida*, 430 U.S. 482, 492 (1977) (quoting *Hernandez* v. *Texas*, 347 U.S. 475, 477 (1954)). And while this principle was originally applied to "absolute exclusion of an identifiable group" it subsequently was enlarged to recognize that "substantial underrepresentation of the group constitutes a constitutional violation as well, if it results from purposeful discrimination." *Castaneda* v. *Partida*, 430 U.S. at 493.

The rationale for the Court's recognition of a defendant's right to dismissal of an indictment returned by a grand jury from which members of his or her own race have been excluded by intentional discrimination was stated in the earliest decision applying that principle as it emerged in the petit jury context (*Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879) (emphasis added)):

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, *is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.*

Because the "exclusion from grand jury service of Negroes, or any group otherwise qualified to serve" is especially odious, "destroys the appearance of justice," "casts doubt upon the integrity of the judicial process," and thereby "impairs the confidence of the public in the administration of justice," the Court has held that a "criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded" (*Rose* v. *Mitchell*, 443 U.S. at 555-556). It has therefore "reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage" (*id.* at 556).

b. By their own terms, this Court's decisions under the Equal Protection Clause of the Fourteenth Amendment requiring dismissal of an indictment that is the product of a grand jury constituted through intentional discrimination have no application here. As petitioner appears to concede (Br. 62), as a white male he lacks standing to complain of discrimination against women and black persons in the selection of forepersons. The

Court has consistently held—from *Strauder* through *Rose* v. *Mitchell*, 443 U.S. at 555—that the injury that supports an equal protection attack upon an indictment is the "brand" upon the excluded group, the "assertion of their inferiority," that is thought to stimulate "race prejudice which is an impediment to securing to individuals of the [excluded] race * * * equal justice" (*Strauder* v. *West Virginia*, 100 U.S. at 308. Obviously, petitioner, a white male, has suffered no such injury, even if it is assumed that the alleged discrimination against women and blacks could have the corrosive impact described in *Strauder* when limited to the selection of a foreperson. Petitioner does not and cannot allege that *he* has suffered any injury resulting from any stigma that might have been planted in the minds of the jury, that *he* has been branded as inferior, or that *he* has been exposed to adverse racial prejudice that in any way diminished the prospects for impartial and dispassionate consideration of his case by the grand jury.

This Court has repeatedly characterized an equal protection claim founded upon alleged discrimination against an identifiable group in jury selection in terms that suggest that the injury to be redressed does not extend to persons who are not members of the class allegedly subjected to discrimination. For instance, in *Castaneda* v. *Partida* the Court summarized its teaching (430 U.S. at 492 (quoting *Hernandez* v. *Texas*, 347 U.S. 475, 477 (1954) (emphasis added)):

> This Court has long recognized that "it is a denial of equal protection of the laws to try *a defendant of a particular race or color* under an indictment issued by a grand jury . . . from which all persons of *his* race or color have, solely because of that race or color, been excluded * * *."

And the Court reiterated in *Rose* v. *Mitchell* that " 'in order to show that an equal protection violation has occurred in the context of grand jury [foreman] selection, the defendant must show that the procedure employed resulted in ***substantial underrepresentation of his race or***

of the identifiable group to which he belongs'" (443 U.S. at 565 (emphasis added; quoting *Castaneda* v. *Partida*, 430 U.S. at 494)).

Similarly, in *Alexander* v. *Louisiana*, 405 U.S. 625 (1972), the Court declined to entertain a claim that a male defendant had been denied equal protection of the laws by Louisiana's exemption from jury duty of women who do not volunteer for service, strongly suggesting that the defendant lacked standing to press the claim (405 U.S. at 633):

> This claim is novel in this Court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from the grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. *Carter* v. *Jury Commission*, [396 U.S. 320 (1970)]. But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service.[9]

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[9] The Court ultimately rested its decision in this branch of *Alexander* upon its practice of eschewing decision of constitutional issues where avoidable, observing that the conviction challenged there had been reversed on other grounds, and that the sex discrimination issue might become moot (405 U.S. at 633-634). But the Court's skeptical appraisal of the defendant's standing to raise an equal protection claim is nonetheless telling.

Contrary to the assertion of amicus LDEF (Br. 8 n.4), that appraisal did not rest upon the Court's recognition that the Fifth Amendment's requirement of indictment by a grand jury does not apply to the states. In the discussion quoted in the text the Court addressed the defendant's equal protection claim. In the language that followed to which LDEF points, the Court also observed that because the Fifth Amendment Grand Jury Clause is not applicable to the states under the Fourteenth Amendment, "federal concepts of a 'grand jury'" (405 U.S. at 633) established thereunder are inapplicable in state cases. But the Court's comment that the Grand Jury Clause—and any requirements it holds as to the constitution of

In sum, to accord the petitioner standing to raise an equal protection claim would be inconsistent with the gravamen of such a claim and the reasons for dispensing with a requirement that a black defendant show that he was specifically prejudiced by discrimination against blacks in the constitution of the grand jury or petit jury. In declining to extend standing to seek dismissal of an indictment to a nonmember of the class that had allegedly suffered discrimination the Fifth Circuit has recently observed (*United States* v. *Cronn*, 717 F.2d 164, 169 (1983), petition for cert. pending, No. 83-979):

> The essence of an equal protection claim is that other persons similarly situated as is the claimant unfairly enjoy benefits that he does not or escape burdens to which he is subjected. * * * Equal protection claims are of their nature personal, to be stated in terms of one's own rights or those of a class in which one claims membership; logically [a defendant] lacks standing to complain of unequal treatment accorded other persons or classes of which he is not a member.

Accord: *United States* v. *Coletta*, 682 F.2d 820, 824 (9th Cir. 1982), cert. denied, No. 82-798 (Feb. 22, 1983).[10] Moreover, as the Fifth Circuit has also observed (*United*

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the grand jury (see pages 35-37, *infra*)—had no application should not obscure its separate discussion of the inapplicability of equal protection principles. As the Court reiterated in *Rose* v. *Mitchell*, 443 U.S. at 557 n.7, states that *do* employ grand juries are not relieved from the operation of the Fourteenth Amendment Equal Protection Clause. See also *Peters* v. *Kiff*, 407 U.S. 493, 496, 501 (1972) (opinion of Marshall, J.).

[10] As explained in our Brief in Opposition in *Cronn*, the Eleventh Circuit, which has permitted nonmembers of a class allegedly suffering discrimination in grand jury foreperson selection to raise an equal protection claim, see *United States* v. *Cross*, 708 F.2d 631, 633-634 (1983), petition for cert. pending, No. 83-1037; *United States* v. *Perez-Hernandez*, 672 F.2d 1380 (1982), has failed to observe the distinction for purposes of standing between the due process and equal protection challenges to an indictment established in *Peters* v. *Kiff*. (A copy of our Brief in Opposition in *Cronn* has been provided to petitioner.)

States v. *Cronn*, 717 F.2d at 169-170), there is no special relationship or nexus between a defendant such as petitioner and the black or female grand jurors allegedly suffering discrimination in foreperson selection that might justify allowing that defendant vicariously to assert their rights.[11] Thus, denial of standing to petitioner to raise an equal protection claim is required by this Court's decisions that a party ordinarily may not assert the constitutional rights of strangers, see, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973)—a principle that applies to criminal defendants no less than other litigants. See *United States* v. *Salvucci*, 448 U.S. 83, 86-87 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978); *Brown* v. *United States*, 411 U.S. 223, 230 (1973); *Alderman* v. *United States*, 394 U.S. 165, 174 (1969).

2. Even if petitioner had standing to complain of discrimination in the selection of grand jury forepersons from among the members of a properly constituted grand jury, he would not be entitled to reversal of his conviction and dismissal of the indictment. As petitioner observes (Br. 63-65), *Peters* v. *Kiff*, 407 U.S. 493 (1972), held that a white defendant had standing to seek reversal of his conviction and dismissal of his indictment on the ground that black persons "were systematically excluded from the grand jury that indicted him and the petit jury that convicted him" (407 U.S. at 494 (opinion of Marshall, J.)). But close examination of *Peters* suggests that petitioner cannot prevail upon his claim lim-

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[11] Contrary to the assertion of the LDEF (Br. 14 n.7), this case is in no respect analogous to *Barrows* v. *Jackson*, 346 U.S. 249 (1953), in which the Court permitted a white person being sued for damages for breach of a racial restrictive covenant to assert that enforcement of the covenant would deny equal protection of the laws to nonwhite would-be purchasers. The Court emphasized that its ruling was limited to the "unique situation" and "peculiar circumstances" of the particular case and depended upon the practical inability of persons whose rights were asserted to protect them directly in litigation (346 U.S. at 257). See *United States* v. *Cronn*, 717 F.2d at 169.

ited, as it is, to discrimination in the selection of a grand jury foreperson.

a. *Peters* was decided without an opinion for the Court. Justice Marshall, joined by Justices Douglas and Stewart, reasoned that any criminal defendant "has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law" (407 U.S. at 504). Justice Marshall stated that exclusion of persons from jury service on the basis of their race "cast doubt on the integrity of the whole judicial process" (*id.* at 502) and therefore implicates the right of every defendant to a competent tribunal (*id.* at 501-502). Justice Marshall reasoned (*id.* at 503-504 (footnote omitted)) that exclusion of

> any large and identifiable segment of the community * * * from jury service * * * remove[s] from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

To underscore the nature of the injury to a white defendant's rights perceived in the exclusion of black persons from jury service, Justice Marshall quoted (407 U.S. at 504 n.12) from *Ballard* v. *United States*, 329 U.S. 187, 193-194 (1946) (footnote omitted), in which the Court reversed the conviction of a female defendant convicted and indicted by juries from which women had been systematically and intentionally excluded:

> "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of differ-

ence. *Yet a flavor, a distinct quality is lost if either sex is excluded.*" [Emphasis added.]

Justice White, joined by Justices Brennan and Powell, concurred in the Court's judgment in *Peters* v. *Kiff* without joining Justice Marshall's opinion. Pointing to 18 U.S.C. 243, which provides that no otherwise qualified citizen "shall be disqualified for service as grand or petit juror" in any state or federal court "on account of race, color or previous condition of servitude," these Justices reasoned that "Congress [had] put cases involving exclusions from jury service on grounds of race in a class by themselves" (407 U.S. at 505-506). Standing was to be extended to a white defendant, in Justice White's view, to "implement the strong statutory policy of [18 U.S.C.] 243" (*id.* at 507).

b. Neither the concerns that led the Court to extend standing to challenge exclusion of black citizens from jury service to white defendants in *Peters*, nor the considerations that have led the Court in the equal protection jury selection cases to direct dismissal of indictments without regard to specific prejudice to the individual defendant, are significantly implicated in the very different setting of a challenge to the selection of a federal grand jury foreperson.

Under the law of some states, grand jury forepersons are selected by a process separate from that used in impaneling the grand jury, and then tacked on to the membership of that body. See, *e.g.*, *Rose* v. *Mitchell*, 443 U.S. at 548 n.2. Under Fed. R. Crim. P. 6(c) the federal grand jury foreperson, by contrast, is simply selected by the court from among the members of the grand jury. Accordingly, any discrimination in selection does not at all affect the overall composition of the grand jury.[12]

[12] The question presented here therefore differs in an important respect from that reserved in *Rose* v. *Mitchell*, 443 U.S. at 551-552 n.4. In the Tennessee system considered there, the foreperson was selected separately from the other 12 members of the grand jury (*id.* at 548 n.2). In holding that discrimination affecting only the selection of the foreperson impairs the validity of an indictment,

A federal grand jury is itself required by statute to be drawn "at random from a fair cross section of the community in the district or division wherein the court convenes" (28 U.S.C. 1861). This must be done by a process that tolerates no exclusion from service "on account of race, color, religion, sex, national origin, or economic status" (28 U.S.C. (Supp. V) 1862), and pursuant to a written plan that the Circuit Judicial Council has determined to conform with these requirements and the additional criteria of 28 U.S.C. (& Supp. V) 1863(b) (28 U.S.C. 1863(a)). It would be unrealistic, therefore, to suggest that, in the absence of any overt manifestation of prejudice, the mere designation of one of the grand jury's members as foreperson (an inevitable occurrence) could "cast doubt upon the integrity of the whole judicial process" (*Peters* v. *Kiff*, 407 U.S. at 502 (opinion of Marshall, J.)) or would "impair[] the confidence of the public in the administration of justice" (*Rose* v. *Mitchell*, 443 U.S. at 556).

In addition, because the federal grand jury foreperson is simply selected from among his or her peers, the concern voiced in Justice Marshall's opinion in *Peters* for the narrowing of the range of experience and perspective that occurs when "any large and identifiable segment of the community is excluded from jury service" (407 U.S. at 503) does not arise when the alleged discrimination pertains to the selection of a foreperson from

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the court of appeals had observed that "the foreman or forewoman is a full member of the grand jury" and had reasoned that "a grand jury which is only twelve-thirteenths constitutional cannot render constitutionally valid indictments." *Mitchell* v. *Rose*, 570 F.2d 129, 136 (6th Cir. 1978). The court of appeals distinguished (*id.* at 136) its prior decision in *Hale* v. *Henderson*, 485 F.2d 266, 269-270 (6th Cir. 1973), cert. denied, 415 U.S. 930 (1974), in which it had rejected a defendant's challenge to selection of the foreperson from among the members of a properly constituted grand jury. See also 485 F.2d at 272 (Lambros, J., concurring). This case, of course, resembles *Hale* v. *Henderson* rather than *Mitchell* v. *Rose*. Accordingly, we need not and do not argue here that a de minimis exception should be recognized to the rule of *Peters* v. *Kiff* that governs challenges to the constitution of the grand jury itself.

among the members of a properly constituted federal grand jury.[13] Because the single individual designated as foreperson necessarily cannot embody the full range of "human nature and varieties of human experience" (*ibid.*), and because substantial safeguards do assure that the constitution of the federal grand jury as a whole serves the purposes highlighted in *Peters*, a challenge to foreperson selection does not implicate the due process rights of a criminal defendant. See *United States* v. *Coletta*, 682 F.2d at 824.[14]

It seems to be petitioner's assumption that the foreperson selection decision should be regarded as analogous to the selection of a grand jury, only in microcosm, and should trigger precisely the same procedural rights for criminal defendants as are associated with grand jury selection. But this Court has never embraced that course of analysis. Rather, in applying the Sixth Amendment jury trial guaranty, for instance, the court has emphasized that the fair cross section principle deduced from the Sixth Amendment is not to be extended to the "microcosm" (*Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975)):

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly

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[13] Because the selection process for a grand jury, unlike that for a petit jury, does not allow for the exercise of peremptory challenges, compare Fed. R. Crim. P. 6(b) (providing that the grand jury array may be challenged for improper selection procedure and that individuals may be challenged as not legally qualified) with Fed. R. Crim. P. 24(b) (peremptory challenges to petit jurors), the selection of grand jurors by the statutorily prescribed mechanism is particularly effective in ensuring that the representational due process values underlying the decision in *Peters* v. *Kiff* are vindicated. Compare *Swain* v. *Alabama*, 380 U.S. 202, 223-224, 226 (1965); see *id.* at 228-231 (Goldberg, J., dissenting).

[14] Nor is it claimed that discrimination in the selection of a federal grand jury foreperson from among grand jury members violates 18 U.S.C. 243. Accordingly, challenges to foreperson selection lie outside the exceptional class of cases recognized by Justices White, Brennan and Powell in *Peters* (407 U.S. at 505-506).

> representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, *Fay* v. *New York*, 332 U.S. 261, 284 (1947); *Apodaca* v. *Oregon*, 406 U.S., at 413 (plurality opinion); but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Accord: *Duren* v. *Missouri*, 439 U.S. 357, 363-364 & n.20 (1979). See also *id.* at 371-373 n.* (Rehnquist, J., dissenting); compare *Swain* v. *Alabama*, 380 U.S. 202, 221-222 (1965), with *id.* at 222-224. So, too, here. The principle underlying *Peters* v. *Kiff* should not be mechanically extended to reach situations in which the considerations that inform that decision have no application.

c. At bottom, the claim that discrimination limited to the designation of a foreperson from among his or her fellow grand jurors requires the dismissal of an indictment should fail because the core concerns expressed in *Strauder* v. *West Virginia* and its progeny as to the debilitating effect of discrimination in jury selection upon the jury's ability to administer justice impartially are present, if at all, only in the most attenuated form here. The grand jury has only one foreperson. The members of the grand jury are required to be chosen at random from a fair cross-section of the community. In these circumstances the identity of the foreperson of any given grand jury could not suggest to its members any official tolerance for a rule of unequal justice.

De jure exclusion of blacks from all jury participation such as was at issue in *Strauder*, or the substantial underrepresentation of minority group members considered in subsequent equal protection decisions, flaunts discrimination in a manner that may well affect the jury's perceptions, affixing a "brand" of "inferiority" upon persons of the disfavored group so as to foster less than impartial consideration of grand jury targets belonging to such

groups. But the grand jury typically operates out of the public eye. Cf. Fed. R. Crim. P. 6(e)(2). And there is no reason to believe—and petitioner does not claim—that the identity and race or gender characteristics of the forepersons of various grand juries over time are matters generally known to the public—or to the members of a given grand jury. Accordingly, it is not at all apparent how discrimination limited to the selection of the foreperson from among a grand jury drawn from a representative sampling of the community could become manifest at all, let alone sufficiently notorious to stigmatize minority defendants and thereby justify a presumption that the integrity of the grand jury has been destroyed. Thus there is no basis in this situation for dismissing an indictment returned by a validly constituted grand jury, absent a showing of actual prejudice to the defendant.

A different result might be warranted if a black or female defendant could show an open and notorious practice by the supervising court of disqualifying black or female grand jurors for service in the impanelment process, or explicitly excluding black or female grand jurors from consideration as forepersons, by reason of their race or sex, or a similar pattern of action by the court that creates a factual predicate for applying the stigma analysis of *Strauder*. Petitioner does not claim that any such evidence of discrimination exists in this case, and the record does not support any such claim.

d. We recognize, of course, that in *Rose* v. *Mitchell*, 443 U.S. at 551-559, the Court rejected the view, espoused there by Justice Stewart joined by Justice Rehnquist (*id.* at 574-579), that a defendant's conviction by a properly constituted petit jury bars any challenge to the indictment on the ground that the grand jury was improperly constituted. The argument advanced here is not inconsistent with that holding.[15] The Court concluded in

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[15] We do not here press the argument rejected by the Court in *Rose*. We note that this case arises on direct appeal from the de-

Rose, 443 U.S. at 554-559, that because the constitutional policy against racial discrimination is especially strong, and because discrimination in jury selection operates as a brand of inferiority that undermines the impartial administration of justice, the remedy of reversal of a conviction and dismissal of an indictment should remain available as a means of vindicating Fourteenth Amendment rights. But, as we have explained, the due process and equal protection rights of defendants simply are not significantly implicated when discrimination only in the selection of a foreperson from among the members of a grand jury drawn from a fair cross section of the community is alleged. And as we explain below (pages 40-50), the costs associated with the remedy petititioner seeks are substantially greater than those associated with challenges to the constitution of the grand jury as a whole, and alternative remedies sufficient to protect the equal protection rights of all persons to serve as grand jury forepersons are available.

In any event, the remedial issue presented here is not analogous to that considered in *Rose* v. *Mitchell*. Before a defendant may be tried upon a criminal charge he must be accused. Accusation thus plays a critical role in the prosecution process; without it no conviction would be possible. Accordingly, even though the states are not constitutionally required to proceed by indictment (see *Rose* v. *Mitchell*, 443 U.S. at 575 n.2 (Stewart, J., concurring)), defendants are entitled to insist that "those States that do employ grand juries * * * comply[] with the commands of the Fourteenth Amendment in the operation of those juries" (*Rose* v. *Mitchell*, 443 U.S. at 557 n.7). But the foreperson of the grand jury has no separate role in the course of the prosecution comparable to that of the grand jury as a whole. His concurrence is not even necessary to the validity of an indict-

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fendant's conviction, rather than upon collateral review, and that the prosecution was constitutionally required to proceed by indictment in this federal case. Compare *Rose* v. *Mitchell*, 443 U.S. at 575 & n.2 (Stewart, J., concurring).

ment. *Frisbie* v. *United States*, 157 U.S. 160, 163-165 (1895); Fed. R. Crim. P. 6(c) advisory committee note 18 U.S.C. App. at 568. And the foreperson's actions and responsibilities are carried out entirely in the context of the operation of the grand jury. He has no authority apart from that of the grand jury as a whole to act in a manner that determines or influences whether a defendant is to be prosecuted. Thus there is no analogy to be drawn between the relationship of the foreperson to the grand jury and that of the grand jury to the trial jury. In sum, nothing in *Rose* v. *Mitchell* suggests that scrutiny of the selection of forepersons from among the grand jury's members at the behest of a criminal defendant, separate and apart from any challenge to the constitution of the grand jury as a whole, is necessary to preserve any right of the defendant.

3. Rather than addressing the policies of *Peters* v. *Kiff* and *Rose* v. *Mitchell*, petitioner's argument that a defendant must be permitted to challenge his indictment by alleging discrimination limited to the selection of a foreperson from among the members of a federal grand jury is wholly divorced from any analysis of this Court's decisions. Compare Pet. Br. 22-46 with *id.* at 47-77. Petitioner's argument is narrowly gauged to dispute the court of appeals' statement (Pet. App. A17) that the duties of a federal grand jury foreperson are "ministerial." Relying upon the tasks assigned to the foreperson according to the Judicial Conference's *Handbook for Federal Grand Juries*, the testimony of federal judges in other cases as to their criteria for selecting forepersons, and the views of certain "social psychiatrists" as to the nature of authority and interpersonal influence in group processes, petitioner argues that the foreperson of a federal grand jury is vested with such "singular power and authority" (Pet. Br. 22) that defendants should be permitted to challenge an indictment by alleging discrimination limited to the selection of the foreperson. Petitioner's characterization of the role of the foreperson is considerably overdrawn. More to the point, however, petitioner's quarrel

with the court of appeals' assessment of the grand jury foreperson's role does not disclose any attribute of that role that implicates the policies underlying the Court's decisions addressing discrimination in the selection of a grand jury or petit jury.

Unlike the grand jury itself, an institution the operation of which is required by the Fifth Amendment, the office of the foreperson is not a creature of the Constitution or any federal statute. Rather, it is a traditional office, which long existed without any statutory foundation,[16] that is currently reflected in the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 6(c) provides, in its entirety:

> The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

These duties—administering of oaths, keeping of records, and attesting to the formal validity of documents—are essentially those of a clerk. The office of foreperson effectively provides the grand jury with a clerical official without jeopardizing the confidentiality of grand jury proceedings. The explanatory notes of the Advisory Committee on Rules that accompany Rule 6(c) do not suggest any broader role for the foreperson. Rather, they simply state that (with the exception of the creation of the position of deputy foreman, an innovation under the rules)

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[16] Describing federal grand jury practice prior to the adoption of the Federal Rules of Criminal Procedure, Professor Orfield stated (*The Federal Grand Jury*, 22 F.R.D. 343, 377 (1959)): "Even though there is no statute so providing the trial court may appoint a foreman."

the Rules merely continued pre-existing practices. 18 U.S.C. App. at 568. The only specific indication of the authority of the foreman is negative: consistent with *Frisbie* v. *United States*, 157 U.S. at 163-165, it is noted that "[f]ailure of the foreman to sign or endorse the indictment is an irregularity and is not fatal" to the effectiveness of the indictment. 18 U.S.C. App. at 568. Accordingly, the court of appeals' characterization of the foreperson's duties as ministerial is accurate. Accord: *United States* v. *Aimone*, 715 F.2d 822, 827 (3d Cir. 1983), petitions for cert. pending *sub nom. Dentico* v. *United States*, No. 83-681 and *Musto* v. *United States*, No. 83-690.

Nor do the additional duties of the grand jury foreperson reflected in the Judicial Conference's model *Handbook For Federal Grand Juries* (see Pet. Br. 24-28) or in the Eleventh Circuit's opinion in *United States* v. *Cross*, 708 F.2d 631, 637 (1983), petition for cert. pending, No. 83-1037 (see Pet. Br. 29-30), even if actually performed in a given district,[17] materially alter this assessment. Most of these duties are purely administrative or clerical: excusing the attendance of a grand juror from a scheduled session in an emergency, determining the need for an interpreter, signaling the commencement of deliberations when all testimony and evidence have been received and all witnesses and agents of the grand jury have left the room, reporting the actions of the grand jury as necessary to the court, collecting notes so as to preserve the security of the grand jury proceedings, and maintaining order in the grand jury. In other instances, the

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[17] Petitioner does not assert, and the record does not reflect, the use of this *Handbook* or the Model Grand Jury Charge in the Eastern District of North Carolina, and it is clear that the use of the *Handbook* is not uniform throughout the federal court system. See Brief for the United States at 6, *Dentico* v. *United States*, No. 83-681, etc. (A copy of the cited brief has been provided to petitioner.) And the opinion of the Third Circuit in *Aimone* explicitly indicates, 715 F.2d at 827, that the duties of forepersons in the District of New Jersey are more limited than those outlined in *United States* v. *Cross*.

foreperson may act as a conduit for exchange of information between the prosecutor and the grand jury or may be consulted by the prosecutor to determine the grand jury's disposition regarding issuance of a subpoena. But there is no evidence or other reason to believe that in these matters the foreperson acts on his or her own, rather than as the instrument and agent of the grand jury. Cf. *Breese* v. *United States*, 226 U.S. 1, 10 (1912). Petitioner also observes that the foreperson typically is the first of the grand jurors to question grand jury witnesses after the prosecutor has completed his examination. But whatever status may attach to the foreperson as a result of this custom, it is scarcely sufficient to elevate the foreperson, vested by law with no more than the single vote accorded his or her colleagues in determining whether to return an indictment, to an independent position of authority to govern the rights of a defendant.[18]

In any event, petitioner's argument that the foreperson has relatively significant duties and status is simply misdirected. The question is not, after all, whether the position of foreperson is in some abstract sense "con-

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[18] If, contrary to the rule of *Frisbie*, a foreperson's signature (and thus his concurrence) were essential to the validity of an indictment, it might be argued that the foreperson was vested with a veto power over indictments and accordingly is possessed of sufficient independent authority over the action of the grand jury to require separate scrutiny of alleged discrimination in foreperson selection at the behest of a criminal defendant seeking dismissal of his indictment. We note that, in *Rose* v. *Mitchell*, Justice White, joined by Justice Stevens, conditioned his conclusion that discrimination in foreperson selection is a sufficient basis for a defendant's challenge to an indictment upon "the vital importance of the foreman in the functioning of grand juries in Tennessee" (443 U.S. at 589 (White, J., dissenting)). That characterization rested, inter alia, upon the foreperson's veto power over indictments and the fact that the foreperson was selected separately from the other members of the grand jury and yet had the full authority of a grand jury member (*id.* at 589-590 n.1 (quoting *Mitchell* v. *Rose*, 570 F.2d at 136)). The federal grand jury foreperson has neither of these attributes. See also pages 22-23 note 12, *supra*.

stitutionally significant." For instance, we do not doubt that black or female grand jurors arbitrarily deprived of the opportunity to serve as foreperson have suffered a deprivation of equal protection of the laws that may be redressed in an appropriate civil proceeding. See page 48, *infra*. But petitioner's claim cannot be decided by a standard measuring whether the foreperson's job is important enough to make its performance desirable or worthwhile as a part of citizenship—any more than a defendant should be allowed to contest his indictment by showing discrimination in the employment of security or clerical personnel by the court, in the employment of attorneys by the prosecutor, or in appointment of judges by the President. Rather, petitioner must show that the role of the foreperson is such that discrimination in his or her selection invades the distinctive interests of a defendant that underlie *Strauder*, *Rose* and *Peters*. Measured by this standard, petitioner's claim falls far short of the mark. Whatever informal status or influence the foreperson may enjoy, it scarcely negates the efficacy of proper selection of the grand jury as a whole as a guaranty that a representative spectrum of "human nature and varieties of human experience" (*Peters* v. *Kiff*, 407 U.S. at 503) is brought to bear upon the decisions made by the grand jury. Nor does any influence or status enjoyed by the foreperson materially increase the highly remote prospect that selection of one member of the body as a foreperson will be perceived as relegating any race or sex to an inferior legal status.

For similar reasons, the other evidence adduced by petitioner to demonstrate the "constitutional significance" of the federal grand jury foreperson does not advance his cause. We need not quarrel with petitioner's characterization of the testimony of the various federal judges who have been required to account for their foreperson appointment practices in cases similar to this one (Pet. Br. 31 (quoting in part, *United States* v. *Cross*, 708 F.2d at 636)):

> Almost uniformly [the federal judges] select as forepersons those [grand jurors] with good manage-

> ment skills, strong occupational experience, the ability to preside, good educational background, personal leadership qualities, and someone who "can not easily be led by the United States Attorney."

Nor do we doubt that federal judges "take the responsibility of appointing a grand jury foreperson with great concern" (Pet. Br. 32.) But it hardly stands to reason, as petitioner suggests, that the district judges entrusted with the supervision of the grand jury would not give careful attention to the selection of a foreperson, and would not bother to look for the qualities described by petitioner unless they believed that "there are special powers or duties in the foreperson far beyond that borne by the other jurors" (Pet. Br. 36-37).

The selection of the foreperson is entrusted to the district court by law (Fed. R. Crim. P. 6(c)). It is hardly significant that a federal judge should carry out any such duty with diligence and care. And it is only rational that qualities such as those listed by petitioner should be sought after by district judges in designating a foreperson. While the duties of the foreperson are generally administrative or clerical in character, it is still important to the administration of justice that they be carried out properly and effectively. But neither the testimony cited by petitioner, nor the apparent judicial consensus that a certain level of experience and personal skills is desirable in a foreperson, indicates that discrimination in selecting a foreperson frustrates the right of a criminal defendant to a tribunal drawn from a representative sampling of the community or to be free from stigmatizing official action reflected in the jury room.

The "theoretical evidence" provided by "social psychiatrists" cited by petitioner (Br. 37-44) is equally deficient in this critical respect. Conceivably the designation of one grand juror as foreperson by the district court enhances to some extent the status of that grand juror in the eyes of his or her colleagues and provides the foreperson with some degree of informal influence greater than his actual authority. But the selection of a fore-

person still does not deprive a defendant of whatever benefit may be derived from the varied points of view of the members of the grand jury or create a substantial appearance of official discrimination within the jury room. The fact remains that, whatever the foreperson's influence, it can operate to affect the defendant's rights only through the body of the grand jury as a whole. See *United States* v. *Aimone*, 715 F.2d at 827.[19]

Unlike petitioner, the court of appeals carefully focused its examination of the role of the federal grand jury foreperson, not upon the abstract importance of the tasks associated with the office, but upon the impact of foreperson selection on the distinctive interests of criminal defendants (see Pet. App. A17-A18; see also page 8, *supra*). Nothing in petitioner's portrayal of the role of the foreperson calls in question the court of appeals' appraisal of his speculative contention (Pet. App. A18):

> Any suspicion that [the foreperson's] office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions.

4. The alternative legal bases for petitioner's claim adduced by petitioner and the amici do not warrant any different result here.[20]

a. Petitioner appears to invoke (Br. 62-70) this Court's Sixth Amendment decisions requiring petit juries to "be drawn from a source fairly representative of the community" (*Taylor* v. *Louisiana*, 419 U.S. at 538; see also *Duren* v. *Missouri*, 439 U.S. at 363-364). Of course, the Sixth Amendment, which assures "the accused" in "all criminal prosecutions" the "right to a speedy and public trial, by an impartial jury of the State

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[19] In *Aimone* the Third Circuit concluded: "[W]e are not persuaded that the duties performed by a federal foreperson confer the power to control the decision-making process of the grand jury" (715 F.2d at 827).

[20] As noted above (pages 14-15; see also page 6 note 4, and pages 7-8 note 6), these arguments were not advanced by petitioner in the courts below.

and district wherein the crime shall have been committed" plainly has no application to the constitution of a grand jury

Amicus Curiae ACLU suggests (Br. 9-18), however, that the Fifth Amendment Grand Jury Clause, which provides that

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

should be interpreted to embody a "fair cross section" guaranty for grand jury selection comparable to the Fifth Amendment's requirements for petit jury selection. We may assume that ACLU is correct in this regard. See *Castaneda* v. *Partida*, 430 U.S. at 509-510 (Powell, J., dissenting). In any event, as the Eleventh Circuit has observed, the Jury Selection and Service Act of 1968, 28 U.S.C. 1861, extends the fair cross section right to include the venire of a federal grand jury. *United States* v. *Perez-Hernandez*, 672 F.2d at 1384; see page 23, *supra*. But invocation of the Fifth Amendment Grand Jury Clause, the Jury Selection and Service Act of 1968 (see LDEF Br. 14-18), or the fair cross section concept borrowed from Sixth Amendment cases provides no basis for a criminal defendant's challenge to his indictment predicated upon underrepresentation of blacks or women among federal grand jury forepersons.

In *Taylor* v. *Louisiana*, the Court set forth the basis for its conclusion that petit juries must be drawn from a fair cross section of the community, explaining that among the purposes of a jury is (419 U.S. at 520)

> to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. *Duncan* v. *Louisiana*, 391 U.S., at 155-156. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the ad-

> ministration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

But as we have previously explained (pages 20-25), these representational values, which also underlie *Peters* v. *Kiff*, are fully secured by the Jury Selection and Service Act's requirement that the grand jury be drawn at random from a fair cross section of the community. Identification of one member of that representative group as foreperson is an inevitable occurrence that does not impair the grand jury's ability to serve as the voice of the community. Thus, in holding the fair cross section principle inapplicable to foreperson selection, the Eleventh Circuit has observed (*United States* v. *Perez-Hernandez*, 672 F.2d at 1385):

> [T]he fair cross section analysis is only applicable to groups, such as a grand or petit jury, which can represent society as a whole. One person alone cannot represent the divergent views, experience, and ideas of the distinct groups which form a community. Thus, a grand jury foreman is a member of the group which represents a cross section of his or her community, but he or she cannot be a fair cross section of that community.

See also *Ballew* v. *Georgia*, 435 U.S. 223, 239 (1978) (jury of five too small to fulfill representational requirements of Sixth Amendment); compare *Williams* v. *Florida*, 399 U.S. 78, 100 (1970) (jury of six large enough to provide "fair possibility for obtaining a representative cross-section of the community").[21]

Any contention that the fair cross section requirement should be extended to the selection of the foreperson departs entirely from the underlying constitutional text. The explicit guaranties of trial by jury and indictment by a grand jury may reasonably be said to contemplate

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[21] Rotation of the duties of foreperson among the members of the grand jury would arguably be the only way to meet a fair cross section requirement.

bodies of a particular character. But the office of grand jury foreperson has no constitutional foundation at all; it can hardly be claimed that a particular means of designating a foreperson implicates the constitutional right to indictment. Petitioner and the amici offer no historical evidence that a particular mode of foreperson selection is integral to the very notion of a grand jury. Thus because the purpose of the fair cross section requirement is not served by its extension to foreperson selection, there is no justification for bestowing any such novel right upon criminal defendants.

Moreover, in *Taylor* v. *Louisiana*, the Court pointedly declined to extend the fair cross section requirement beyond jury venires or lists to the jury actually impanelled, stating, "we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population" (419 U.S. at 538). There is obviously less reason to extend that requirement to the designation of one member as foreperson—a designation which inherently cannot reflect fair cross section values in any particular case.

b. Amicus LDEF alone argues (Br. 14-18) that the Jury Selection and Service Act of 1968, 28 U.S.C. (& Supp. V) 1861 *et seq.*, is somehow applicable to the selection of federal grand jury forepersons. Amicus concedes (Br. 15) that nothing on the face of the Act is applicable to discrimination in foreperson selection. Instead LDEF suggests that 28 U.S.C. 1861, which states the policy of the United States "that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States," is broad enough to encompass the selection of grand jury forepersons. We disagree.

Section 1861 states, at the outset, the policy of the United States that all litigants entitled to trial by jury "shall have the right to grand and petit juries selected at random from a fair cross section of the community." If Congress had meant to extend this right to selection of grand jury forepersons it assuredly would have said so explicitly. This is especially so because to do so would

have run contrary to this Court's established teaching that defendants are not entitled to a jury of any particular composition. See *Fay* v. *New York*, 332 U.S. 261, 284 (1947).

The structure and provisions of the balance of the Jury Selection and Service Act confirm that the Act does not extend so far as LDEF suggests. Following an introductory statement of policy and declaration of rights (28 U.S.C. 1861 and 1862), the Act proceeds to lay out, in extraordinary detail, procedures for establishing plans for random jury selection, for drawing names from a master list of qualified jurors, and for summoning jury panels. Qualifications for jury service are spelled out, as are procedures for challenging compliance with mandated selection procedures. See 28 U.S.C. (& Supp. V) 1863-1867. No mention of the office of foreperson or the selection of a grand jury foreperson is anywhere to be found, however. And the remedial provisions of the Act make clear that it does not cover foreperson selection. They provide that a criminal defendant or the government "may move to dismiss the indictment or stay the proceedings * * * on the ground of substantial failure to comply" with the Act's requirements "in selecting the grand or petit jury." 28 U.S.C. 1867(a) and (b). No comparable remedy is provided for improper foreperson selection.[22]

c. Petitioner and amicus LDEF argue (Pet. Br. 70-76, LDEF Br. 4-13); finally, that this Court should exer-

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[22] Nothing in the legislative history of the Jury Selection and Service Act supports its application to foreperson selection. LDEF suggests (Br. 16-18) that because Congress disapproved the "key man" system for jury selection, it must also have disapproved the discretionary method of foreperson selection that prevails under the Federal Rules of Criminal Procedure. But Congress plainly did not supersede Rule 6(c) in the Jury Selection and Service Act, as it did key man jury selection systems. And the analogy drawn between the two systems by LDEF is insubstantial. The district court's discretion to designate a foreperson from among the members of a properly constituted grand jury has no impact upon the constitution of the grand jury as a whole and thus is not remotely comparable to the key man system of selecting jurors.

cise supervisory power to reverse the conviction of a defendant where discrimination in the selection of the grand jury foreperson is established. But the cases upon which petitioner and LDEF rely[23] simply establish the right of "any defendant to challenge the arbitrary exclusion from jury service of his own or any other class," a right that subsequently has been recognized as premised upon the Sixth Amendment right to a jury drawn from a fair cross section of the community. See *Peters* v. *Kiff*, 407 U.S. at 500 & n.9 (opinion of Marshall, J.). Nothing in these cases—each of which entails exclusion of a substantial class of eligible persons from the jury as a whole—establishes that exercise of supervisory power to reverse a defendant's conviction is appropriate when any discrimination is limited to the selection of a foreperson from among the members of a properly constituted grand jury. Moreover, the Court has emphasized that "the supervisory power does not extend so far" as to "confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States* v. *Payner*, 447 U.S. 727, 737 (1980). Accordingly, if, as we contend, the principles of equal protection and due process enunciated in *Strauder* and its progeny and *Peters* v. *Kiff*, do not require that a defendant's conviction be reversed and his indictment dismissed in the circumstances of this case, the supervisory power of this Court and of the lower federal courts should not be employed to circumvent deliberately established limits upon the procedural rights recognized in those cases.[24]

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[23] *Glasser* v. *United States*, 315 U.S. 60 (1942), *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), and *Ballard* v. *United States*, 329 U.S. 187 (1946).

[24] In *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6, the Court recognized that one of the purposes that may justify use of supervisory power is "to implement a remedy for violation of recognized rights." But, as we have explained, discrimination limited to the selection of a federal grand jury foreperson from among its members does not engage any right of a criminal defendant such as petitioner to an impartial or broad-based tribunal, or to

B. Scrutiny of Foreperson Selection Practices At the Behest of a Criminal Defendant in the Manner Proposed by Petitioner Would Impose Substantial and Unwarranted Burdens upon the Administration of Justice

In *Rose* v. *Mitchell*, 443 U.S. at 557, the Court acknowledged that there are "costs associated with" permitting a criminal defendant to challenge his indictment on the basis of discrimination in jury selection against members of a population group that includes the defendant. But the Court concluded that those costs were outweighed in that setting by the policy of combating racial discrimination. As we have explained above, the discrimination alleged here simply does not engage the interests of a criminal defendant that the Court has guarded in previous equal protection and due process rulings regarding jury selection. In addition, the costs for the administration of justice associated with recognizing a defendant's right to challenge his indictment on the basis of alleged discrimination limited to the naming of the foreperson are substantially greater than those that are present when the allegation is that the entire grand jury or petit jury has been selected in a discriminatory manner.

1. The rule that petitioner urges upon this Court is borrowed from cases where discrimination in the constitution of the grand jury as a whole is alleged. See, *e.g.*, Pet. Br. 59-61 (quoting *Castaneda* v. *Partida*, 430 U.S. at 494-495). Thus, like the Eleventh Circuit, petitioner maintains:

> In order to support a prima facie case in the context of grand jury foremen, a defendant must establish three factors. First, the group allegedly discriminated against must be "one that is a recognizable distinct class, singled out for different treat-

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be free of stigmatizing influences in the jury room. And, as we explain below (pages 46-50), granting a remedy to a criminal defendant is not necessary to protect the rights of black or female grand jurors to a fair opportunity to be considered for the post of grand jury foreperson.

> ment under the laws." Second, the group must be substantially underrepresented in the office of grand jury foreman over a significant period of time. Third, in order to complete the presumption of discrimination raised by the statistical evidence, the defendant must show that the selection procedure is not racially neutral or is susceptible to abuse as a tool of discrimination.

United States v. *Perez-Hernandez*, 672 F.2d at 1386-1387 (quoting *Castaneda* v. *Partida*, 430 U.S. at 494). If such a prima facie case is made out by showing historic underrepresentation of women or blacks, then the burden of rebutting an inference that this statistical pattern is attributable to intentional discrimination is said to shift to the government (Pet. Br. 61 (quoting *Castaneda* v. *Partida*, *supra*); I C.A. App. 207; see also *United States* v. *Perez-Hernandez*, 672 F.2d at 1387).

In mechanically borrowing this "rule of exclusion" from grand jury and petit jury selection cases, petitioner and the Eleventh Circuit have failed to recognize that its operation is materially different in the context of a challenge to the selection of the foreperson.[25] It is

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[25] In *Rose* v. *Mitchell*, 443 U.S. at 591, Justice White, joined by Justice Stevens (the only members of the Court having occasion to address the point) observed that because of the small numbers involved, the "rule of exclusion" applied in jury selection cases "may not be well suited" to claims of discrimination limited to foreperson selection. See also *Washington* v. *Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (observing that the elements of a prima facie case of discrimination must be defined in a manner appropriate to the particular context in which discrimination is alleged to have occurred). A substantial argument could be made that, unlike underrepresentation of any significant population group among the members of grand juries or petit juries, underrepresentation of such a group among grand jury forepersons is not so unlikely to be explainable on grounds other than intentional discrimination that it should be sufficient to raise a prima facie case of discrimination. Compare *Castaneda* v. *Partida*, 430 U.S. at 493; *Washington* v. *Davis*, 426 U.S. at 241. Thus, it is our view that petitioner and the Eleventh Circuit have improperly applied the method of proof employed in jury selection cases in the foreperson

a misleading euphemism to state, in this context, that when statistical proof of underrepresentation of some group is adduced, the burden shifts to the "government" to demonstrate that the selection process did not entail discrimination. The foreperson of a federal grand jury is selected by the district judge who impanels and supervises the grand jury. Unlike more conventional challenges to the constitution of a grand jury or petit jury, therefore—where rebuttal may be accomplished by adducing written records and the testimony of clerical personnel—the only means realistically available to "the government" to rebut an inference of discrimination in the selection of forepersons is to call as witnesses the United States District Judges that have appointed grand jury forepersons. See *United States* v. *Cabrera-Sarmiento*, 533 F. Supp. 799, 805 (S.D. Fla. 1982).[26] The sitting

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selection context. If, contrary to our main submission, a criminal defendant is entitled to seek dismissal of his indictment on the basis of alleged discrimination in the selection of a foreperson, he should at least be required to exclude "the most common nondiscriminatory reasons" for underrepresentation before the burden is placed upon the court to rebut an inference of discrimination. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). In view of the substantial nonracial criteria that are generally employed to select forepersons (see pages 45-46, *infra*) a defendant's prima facie case should include evidence that blacks and women were on the indicting grand jury and available for appointment, and that their qualifications for selection as foreperson were at least equal to those of the person appointed. In this case the record is silent as to the membership of the grand jury that indicted petitioner (see page 5, *supra*). (We note that consistent application of the rule of exclusion to the foreperson selection context would require, at a minimum, that the proportion of black or female forepersons be measured against the membership of the grand juries from which they were drawn, rather than the population as a whole as was done here. See *United States* v. *Cabrera-Sarmiento*, 533 F. Supp. 799, 805-806 (S.D. Fla. 1982). Petitioner did not present evidence necessary to make the proper comparison (see pages 5-6, *supra*).)

[26] This procedure was employed in *United States* v. *Cabrera-Sarmiento*, 533 F. Supp. at 805 (number of judges testifying not specified); *United States* v. *Breland*, 522 F. Supp. 468, 471-474

judges of the district court are then disqualified to hear such a case, and a visiting judge from another district or the court of appeals must be designated for this purpose.[27] The district judges are required to testify in considerable detail as to the methods they use for foreperson selection, the criteria employed, and any discriminatory practices. See, *e.g.*, *United States* v. *Breland*, 522 F. Supp. 468, 471-474 (N.D. Ga. 1981).

Judge Hatchett of the Eleventh Circuit, who has heard a number of such cases sitting by designation in the district courts, has explained that "[b]ecause the elements of a prima facie case remain constant from one defendant to another, it is theoretically possible for a different de-

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(N.D. Ga. 1981) (nine judges testifying); *United States* v. *Manbeck*, 514 F. Supp. 141, 150 (D. S.C. 1981) (two judges testifying); *United States* v. *Northside Realty Associates*, 510 F. Supp. 668, 683-684 (N.D. Ga. 1981) (eight judges testifying); *United States* v. *Holman*, 510 F. Supp. 1175, 1180-1181 (N.D. Fla. 1981), aff'd, 680 F.2d 1340 (11th Cir. 1982) (two judges testifying); *United States* v. *Jenison*, 485 F. Supp. 655, 665-666 (S.D. Fla. 1979) (eight judges testifying). See also *Perez-Hernandez*, 672 F.2d at 1383 (decided, pursuant to stipulation, on the basis of the record in *Jenison*).

[27] This procedure was employed in all of the cases listed in the previous footnote except for *Manbeck*.

Application of the rule of exclusion to the grand jury foreperson selection context in the Eleventh Circuit appears to be logically flawed. Unlike juror selection, which is typically a centralized process carried out in a uniform manner in any judicial district or jurisdiction, the selection of a foreperson in the federal system is, as petitioner observes (Pet. Br. 22), an informal process carried out by district judges acting separately. It is not at all clear why all of the appointments made in a given district over some period of time should be lumped together for purposes of statistical examination. Absent a showing of joint action, the "track record" of any given federal judge is not probative of the intent of any other judge. See *United States* v. *Holman*, 680 F.2d at 1357 n.13 (where defendant was indicted by the first grand jury impanelled by a newly appointed district judge, "a serious question remains as to whether statistics dealing with selections by other judges during the past ten years indeed prove anything at all with regard to the instant appointment"). The record in this case does not reveal the identity of the judges whose appointments were the

fendant to appear each week, presenting the same statistics showing underrepresentation and questioning the same judges as to their mental intent in selecting forepersons." *United States* v. *Cabrera-Sarmiento*, 533 F. Supp. at 806. Moreover, "each defendant indicted by a grand jury [may apparently] bring[] a new challenge notwithstanding the fact that the judge in question has already testified to the satisfaction of the factfinder that he did not harbor discriminatory intent in selecting forepersons" (*ibid.*).[28] The result is described in justifiably pointed terms in *Cabrera-Sarmiento* (*ibid.*):

> We are witnessing a criminal proceeding in which the defendant lounges in the gallery watching his lawyer try the system. A parade of judges, clerks of court, and other court personnel take the witness stand to defend their every action and their character under cross-examination.[29]

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basis for the defendant's statistical showing or the identity of the impanelling judge in petitioner's case.

[28] We note that the rule of exclusion borrowed from the jury selection cases is a blunt instrument in the foreperson selection context. A defendant has suffered no invasion of his rights unless he has been indicted by a grand jury the foreperson of which was selected in a discriminatory manner. See *Castaneda* v. *Partida*, 430 U.S. at 506 (Burger, C.J., dissenting); compare *id.* at 496-497 nn. 16-17; cf. *Rose* v. *Mitchell*, 443 U.S. at 572 n.12. Under petitioner's view of the law, any defendant indicted by a grand jury with a white male foreperson in a district where blacks or women were historically underrepresented in that post is able to cast the burden on the court of accounting for its selection of forepersons. Yet even under a wholly random system of foreperson selection a substantial proportion of forepersons would be white and male in most districts. By contrast, on a multi-member grand jury or petit jury, the absence of blacks or women is a more telling index of possible discrimination. Accordingly, the rule of exclusion operates in a highly indiscriminate manner in the foreperson selection context, substantially magnifying the burden placed upon the courts.

[29] The United States Attorney's Office for the Southern District of Florida advises us that the "theoretical" possibility adverted to in *Cabrera-Sarmiento* has become a stock in trade of criminal defense practice there. See also Miami Herald, Dec. 23, 1981, at 1B

We think it evident that this form of proceeding entails a substantial disruption of the administration of justice, diverts the court from its central tasks, and does little to bolster "the confidence of the public in the administration of justice" (*Rose* v. *Mitchell*, 443 U.S. at 556). But we do not accept Judge Hatchett's suggestion (*Cabrera-Sarmiento*, 533 F. Supp. at 806) that this must be "the end result of *Rose* v. *Mitchell*." Rather, in light of the substantial burden imposed upon the administration of justice, the disfavor with which recourse to judicial testimony is generally viewed,[30] and the minimal impact, if any, of the alleged discrimination on defendants' rights, we think the principles underlying *Rose* v. *Mitchell* and its progenitors do not require this exercise in judicial self-examination.

The substantial disproportion between the costs and benefits of permitting defendants to require the judges of the district court to account for their foreperson selection practices is highlighted by the results of those cases—all in the Eleventh Circuit—in which the government has been put to its rebuttal in this manner. In every instance that we are aware of where the issue was reached, the court determined that the judicial testimony adduced by the government dispelled any inference of discrimination.[31] Strikingly, these determinations were made

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(more than 100 defendants joined in an omnibus motion to dismiss their indictments in *Cabrera-Sarmiento*). According to the United States Attorney, even where defense counsel stipulate that reliance upon judicial testimony given in prior cases is permissible, newly appointed judges are required to be examined on their selection practices, and judges previously examined are periodically required to testify as to their most recent foreperson appointments.

[30] See *Washington* v. *Strickland*, 693 F.2d 1243, 1263 (5th Cir. 1982) (en banc), cert. granted, No. 82-1554 (June 6, 1983); cf. *Fayerweather* v. *Ritch*, 195 U.S. 276 (1904).

[31] *United States* v. *Holman*, 680 F.2d at 1357, aff'g 510 F. Supp. at 1180; *United States* v. *Perez-Hernandez*, 672 F.2d at 1387-1388; *United States* v. *Cabrera-Sarmiento*, 533 F. Supp. at 805; *United States* v. *Breland*, 522 F. Supp. at 479-480; *United States* v. *Manbeck*, 514 F. Supp. at 150; *United States* v. *Jenison*, 485 F. Supp. at 665.

on the basis of the very same testimony that petitioner characterizes as follows (Pet. Br. 31 (quoting *United States* v. *Cross*, 708 F.2d at 636)):

> Almost uniformly [the district judges] select as forepersons those with good management skills, strong occupational experience, the ability to preside, good educational background, personal leadership qualities[,] and someone who "can not easily be led by the United States Attorney."

Petitioner also tells us (Pet. Br. 32) (and we agree) that the testimony shows that district judges take their appointment responsibility very seriously, and carefully review pertinent data about grand jurors in applying those criteria. Unlike petitioner we find no warrant in this testimony for continuing the onerous practice required by the Eleventh Circuit. On the contrary, the testimony canvassed in petitioner's brief and in the decided cases confirms that even where statistical underrepresentation of blacks and women in the position of foreperson has been found, the cause is highly unlikely to be unlawful intentional discrimination. Because it appears so unlikely that statistical underrepresentation of women or minority group members is attributable to intentional discrimination in this setting, a presumption to that effect that triggers a burdensome and sterile exercise in judicial self-scrutiny at the behest of a criminal defendant is not warranted. See *United States* v. *Goodwin*, 457 U.S. 368, 384 (1982).[32]

2. The salutary policy of combating racial or gender discrimination in the administration of justice does not require that defendants be permitted to seek dismissal of their indictments on the basis of alleged discrimination in the selection of a federal grand jury foreperson; nor is this remedy needed to vindicate by proxy the rights of

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[32] We note, as well, that the decision to select a foreperson is necessarily based partly on highly subjective impressions of the members of the grand jury. Just as appellate courts are loathe to look behind a trier of fact's assessment of witness credibility, the courts should be wary of engaging in retrospective evaluation of any particular foreperson selection.

grand jurors who allegedly have been denied fair consideration for appointment as forepersons. Other, more appropriate, means are available to assure that the policy of nondiscrimination is given effect in this setting. Because the allegation of discrimination in foreperson selection is directed against a United States district judge—and effectively constitutes a claim of infidelity to the judge's oath of office (see 28 U.S.C. 453)—it is fitting that recourse be made to these alternative procedures, which generally are designed to provide this Court, the Judicial Conference of the United States, and the Circuit Judicial Councils with effective collegial and supervisory means of eliminating impediments to the administration of justice arising from the operations of the judicial system or the actions of any individual federal judge.

In any instance where one or more individuals believe that they have been unfairly passed over by the court in the selection of a grand jury foreperson as a result of intentional discrimination, or where affected individuals believe that any United States district judge has engaged in a pattern of such discrimination, such practices may properly be called to the attention of the Judicial Council for the appropriate circuit, established pursuant to 28 U.S.C. (& Supp. V) 332. The judicial councils are empowered to address "impediment[s] to the administration of justice" and are directed to "make all necessary and appropriate orders for the effective and expeditious administration of justice" within their respective circuits (28 U.S.C. (Supp. V) 332 (d)(1) and (3)). In order to provide any necessary evidentiary basis for entry of such an order, moreover, the judicial councils are authorized "to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum" (28 U.S.C. (Supp. V) 332(d)(1)). "All judicial officers" within the circuit are required promptly to carry out all orders of the judicial council (28 U.S.C. (Supp. V) 332(d)(2)). We submit that the mechanism thus created is the appropriate mechanism for correcting any improper grand jury

foreperson selection practices that are though to prevail in any district court.[33]

The Judicial Conference of the United States also has a role to play in rectifying a pattern of discriminatory foreperson selection, should it appear that a serious problem of this nature actually exists. The Conference is required to "comprehensive[ly] survey" the business of the federal courts and "continuous[ly] study * * * the operation and effect of the general rules of practice and procedure" in effect for United States Courts. 28 U.S.C. (& Supp. V) 331. Toward that end, the Conference may establish any necessary standing committees to investigate matters within its jurisdiction. Such committees are empowered, like the Judicial Councils, to hold hearings, take sworn testimony, and issue subpoenas in connection with their exercise of authority. *Ibid.* Should it appear upon investigation that the present provisions of the Fed. R. Crim. P. 6(c) are inadequate to ensure that foreperson selection is carried out in a nondiscriminatory manner, the Judicial Conference is empowered to recommend to this Court any amendment to that Rule necessary to carry out that salutary objective. 28 U.S.C. (& Supp. V) 331. And, of course, this Court is empowered to prescribe such rules as may be appropriate for this purpose. 18 U.S.C. 3771. Thus, appropriate means are at hand for eliminating any discrimination that may exist, without resort to reversing criminal convictions and dismissing indictments with the attendant windfall to defendants who have suffered no invasion of their rights. Cf. *United States* v. *Hasting*, slip op. 6-7 & n.5.

In addition to the foregoing procedures, it appears that members of any class of persons unlawfully excluded from service as grand jury forepersons could maintain a civil action for injunctive relief challenging the offending practices on behalf of themselves or any affected

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[33] In the unlikely event that any judicial officer should persist in a course of discrimination in the face of the orders of the Judicial Council, it may be appropriate to file a complaint with the clerk of the court of appeals pursuant to the disciplinary procedures established under 28 U.S.C. (Supp. V) 372(c).

class. See *Carter* v. *Jury Commission*, 396 U.S. 320, 329-330 (1970); *Turner* v. *Fouche*, 396 U.S. 346 (1970).[34] This remedy too "has the advantage of allowing the members of the class actually injured by * * * discrimination to vindicate their rights without the heavy societal cost entailed when valid criminal convictions are overturned" (*Rose* v. *Mitchell*, 443 U.S. at 578 (Stewart, J., concurring in the judgment)).

Even without litigation or formal action by appropriate judicial authority there is good reason to believe that the problem of underrepresentation of blacks and women among federal grand jury forepersons is a vanishing one. As the court of appeals noted (Pet. App. A14 n.6), subsequent to the return of the indictment in this case, blacks and women have been represented among grand jury forepersons in the Eastern District of North Carolina. Moreover, the filing of motions to dismiss indictments such as the one in the present case, and the attention the resulting litigation has by now focused upon the need for appropriate foreperson selection methods, coupled with increased sensitivity throughout the legal system toward the importance of race- and sex-blind justice generally, is likely to ensure fair representation of all racial and gender groups among federal grand jury forepersons in the future.[35]

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[34] Mandamus may also be available to correct any act of unlawful exclusion that is challenged contemporaneously by one so excluded.

[35] Substantial confirmation for that belief is provided by a survey of United States Attorneys conducted by the Department of Justice prior to our acquiescence in the petition for a writ of certiorari in this case. The responses to our inquiries disclose a striking pattern in those districts where there may have been a historical pattern of underrepresentation of women or minorities among forepersons. (That such underrepresentation existed in some districts does not, of course, demonstrate that it was attributable to purposeful discrimination.) In district after district where underrepresentation was believed to have existed in the past, the district courts have recently taken special care to select forepersons in a fashion representative of the community. Moreover, to ensure that no reversal of this trend occurs, the Department of Justice will, irrespective of the ultimate disposition of this case, continue the efforts it has undertaken through the United States Attorneys to call the

In light of these effective avenues for assuring full implementation of the strong policy against discrimination in the administration of justice as it applies to the selection of federal grand jury forepersons, there is no reason to allow criminal defendants to seek dismissal of their indictments by alleging discrimination in this context. Indeed, because of the striking disproportion between the wrong, if any, suffered by a defendant such as petitioner and the remedy sought, reversal of convictions and dismissal of indictments on the ground of discriminatory underrepresentation of members of a particular class in selection of forepersons from among the members of properly constituted grand juries would undermine, rather than bolster "the confidence of the public in the administration of justice" (*Rose* v. *Mitchell*, 443 U.S. at 556). As Judge Morgan stated in *United States* v. *Perez-Hernandez*, 672 F.2d at 1389 (concurring opinion), one

> must wonder how society would view the integrity of our courts if unharmed criminal defendants are released because of discrimination which is unrelated to any significant part of the judicial system. The social costs are not justified in this instance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1984

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attention of the district courts to the importance of nondiscriminatory foreperson selection procedures.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 316